When Children Die as a Result of Religious Practices

I. INTRODUCTION

When children die because of the religious practices of their parents, criminal liability generally follows. Newspapers recount these startling deaths with disturbing frequency.[1] States usually charge these parents with offenses under child endangerment and criminal homicide statutes. The parents invariably assert as a defense the freedom to exercise their religion guaranteed by the first amendment of the United States Constitution.[2]

As is true for most issues of constitutional dimension, legislative and judicial responses to the clash between personal freedom in the practice of religion and governmental interest in the safety of children have evolved unevenly.[3] This Note presents an historical summary of the law in this area and examines the efficacy of contemporary approaches. Statutory, constitutional, and policy issues are discussed in the context of several recent cases.[4]

II. HISTORICAL DEVELOPMENT OF THE LAW

Most cases of children dying as a result of religious practices involve the parents' failure to seek customary[5] medical care.[6] Findings of criminal culpability, particularly those involving negligence, reflect community standards.[7] The dramatic changes in customary medical practice over the last one hundred and fifty years could account for shifting judicial standards in defining negligence.

A. *English Common and Statutory Law*

Early English cases involving children harmed as a result of their parents' religious practices show inconsistent outcomes under both common and statutory law. Typical of an early case reflecting community standards of negligence is *Regina v. Wagstaffe*,[8] decided in 1868 under English common law. In *Wagstaffe*, the parents of a fourteen-month-old girl attributed her coughing to teething. In accordance with the teachings of their sect, The Peculiar People, the parents applied oil to their daughter's chest and called in elders to pray for her.

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1. *See, e.g., Couple Guilty of Murder for Starving Son in Religious Fast*, Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).

2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."); *see infra* note 99 and text accompanying notes 94 through 121.

3. *See* Trescher & O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. PA. L. REV. 203, 205-12; *see also* Note, *California's Prayer Healing Dilemma*, 14 HASTINGS CONST. L.Q. 395, 396-400.

4. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989); Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989); Hall v. State, 493 N.E.2d 433 (Ind. 1986); Commonwealth v. Barnhart, 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).

5. The term "customary" signifies that which is "commonly practiced, used, or observed." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963).

6. Annotation, *Homicide: Failure to Provide Medical or Surgical Attention*, 100 A.L.R.2d 483 (1965).

7. Trescher & O'Neill, *supra* note 3, at 208-10.

8. 10 Cox Crim. Cas. 530 (1868).

The daughter died from inflammation of both lungs, but the jury acquitted the parents of negligence based upon the reasonableness of their belief in prayer.[9]

Reportedly in response to *Wagstaffe*,[10] Parliament passed the Poor Law Amendment Act of 1868 which included "medical aid" among the provisions a parent must make for his child. Failure to make the required medical provisions constituted the misdemeanor offense of "willful[] neglect."[11]

Nevertheless, in *Regina v. Hines*,[12] an English case decided in 1874, after enactment of the Poor Law Amendment Act, the father of a two-year-old boy who died of pneumonia was found not criminally negligent in choosing prayer over current medical practices. Perhaps, as has been suggested by Trescher and O'Neill,[13] the court simply ignored the Poor Law Amendment Act and applied common law principles. When the trial judge directed the not guilty verdict, however, he announced that there existed no "omission of duty" for giving a child "nursing and care instead of calling in a doctor to apply blisters, leeches and calomel . . . ."[14] This judge apparently believed that prayer fell as much within the definition of medical aid as the application of leeches.

Subsequent English cases show a movement away from the common law "reasonableness under the circumstances" test toward a stricter application of the statutory language. *Regina v. Downes*,[15] decided in 1875, exhibits a fact pattern strikingly similar to the fact patterns in *Wagstaffe* and *Hines*. The father of a two-year-old boy summoned an elder to pray for his son whom both thought was teething. Manslaughter charges were filed when the child died of lung inflammation and pleura. The judge in *Downes* directed a guilty verdict based upon jury findings that (1) the child's father neglected to get medical aid when it was reasonable to do so; (2) the child died because of that neglect; (3) the father mistakenly believed medical aid was not needed; and (4) the father truly believed it was wrong to call in medical aid.[16] Thus, criminal culpability was found despite the father's sincerely held belief in treatment through prayer, the court's acknowledgement that the father had made a mistake, and the limits of customary medical practice in 1875.

Regina v. Senior,[17] decided in 1898, evidenced the same result as in *Downes* under a replacement statute to the Poor Law Amendment Act. The Prevention of Cruelty to Children Act of 1894[18] classified neglect of a child by a parent or custodian as a misdemeanor. Unlike its precursor, however, this law made no mention of medical aid; but as Lord Russell opined in *Senior*:

> [i]t would be an odd result if we were obliged to come to the conclusion that, in dealing with such a subject as the protection of children, the Legislature had meant to

9. *Id.* at 533-34.
10. Trescher & O'Neill, *supra* note 3, at 207.
11. 31 & 32 Vict. ch. 122, § 37 (1868).
12. *Noted in* Regina v. Downes, 33 L.T.R. 675, 676 n.(a) (Sept. 1875—Feb. 1876).
13. Trescher & O'Neill, *supra* note 3, at 206.
14. 33 L.T.R. at 676 n.(a).
15. 1 L.R.-Q.B. 25 (1875).
16. *Id.* at 28-29.
17. 1 Q.B. 283 (1899).
18. 57 & 58 Vict. ch. 41, § 1 (1894).

> take . . . a retrograde step; . . . the provisions of the Act of 1894, shew [sic] an increased anxiety . . . to provide for the protection of infants.[19]

The court in *Senior* found that the father of an infant who had died of diarrhea and pneumonia was guilty of willful neglect when he failed to seek medical help. Because his father's neglect either caused or accelerated the child's death, the court upheld the manslaughter conviction.

All of the families in the above-cited English cases belonged to a sect calling themselves The Peculiar People, who believed that the use of medical care evidenced a lack of faith in God. The children's deaths occurred within a period of thirty years, and yet some parents were acquitted and others convicted of criminal negligence and manslaughter because they followed the tenets of their faith. Neither legislative intent, nor fact pattern, nor decision-making procedure adequately accounts for the variance in these cases. The weight given to the parents having acted in accord with religious beliefs is unclear. What is clear, particularly from the appellate opinion in *Senior*, is that the English courts are most likely to favor conviction when the parental neglect is defined in a statute rather than by the common law.[20] American jurisprudence likewise relies heavily upon statutorily-defined child neglect.

B. *American Jurisprudence 1900-1990*

Shortly after the turn of the century, a number of cases were decided in various jurisdictions throughout the United States in which parents were charged with criminal neglect and manslaughter because their children had died following an illness for which traditional medical care was not sought. In each of these cases, the parents introduced religious beliefs as a defense.[21] Although outcomes differed, the courts consistently rejected the first amendment defense of free exercise of religion.[22]

1. *Early Cases: 1900-1960*

Among the frequently cited cases are *People v. Pierson*,[23] *Bradley v. State*,[24] and *Craig v. State*.[25] In *Pierson*, the New York Court of Appeals found prayer healing inconsistent with the state's interest in protecting the lives and health of its children. Mr. Pierson was convicted of manslaughter after his child died of pneumonia. However, in *Bradley*, the Florida Supreme Court reversed a manslaughter conviction which was based on Mr. Bradley's failure to provide medical care for his severely burned daughter. The court reasoned that the failure to provide medical attention was not contemplated by the manslaughter statute and that Mr. Bradley's daughter may have died even with medical care.

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19. 1 Q.B. at 290.

20. Trescher & O'Neill, *supra* note 3, at 208.

21. *See id.* at 208-12. *See also* Note, *supra* note 3, at 398-400; Comment, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 LOY. L.A.L. REV. 396, 405-11 (1975).

22. Comment, *supra* note 21, at 408.

23. 176 N.Y. 201, 68 N.E. 243 (1903).

24. 79 Fla. 651, 84 So. 677 (1920).

25. 220 Md. 590, 155 A.2d 684 (1959).

Bradley's motive, his religious conviction, was held irrelevant.[26] Likewise, in *Craig*, the Maryland Court of Appeals reversed involuntary manslaughter charges against the parents of an infant who died of pneumonia. The court found that had the Craigs called a physician when it was reasonable to do so, the medicine would have been ineffective to save their child. With respect to the religious defense, however, the *Craig* court stated that "[w]hile a person's freedom *to believe* is absolute, his freedom *to act* is not."[27]

These early cases typify the ambivalence of the judicial system toward persons whose sincerely-held religious beliefs harm their children. The inconsistent results reflect a tension between a desire to vindicate the child's needless death through conviction and a desire to acknowledge the parent's good intentions through acquittal.

2. *Modern Cases: 1960-1990*

Despite the historical lack of success of the religious defense, the defense is consistently asserted in cases involving children who die from lack of medical care. One commentator has noted that a large proportion of convictions in these cases were reversed on appeal, often for reasons unrelated to the charge, and suggests that perhaps this reflects sympathy for the dilemma of parents whose faith dictates unlawful conduct.[28] In 1960, Trescher and O'Neill went so far as to predict that growing legislative, judicial, and social acceptance of healing through prayer would ultimately eliminate criminal prosecution in the event that the healing did not work.[29]

In contrast to this prediction, cases of the 1980s involving harm to children as a result of religious practices show an increasing trend toward serious criminal prosecution. Four cases illustrate this trend: (1) in *Commonwealth v. Barnhart*,[30] the Superior Court of Pennsylvania upheld involuntary manslaughter convictions of parents whose infant son died of cancer because their religious beliefs precluded seeking medical treatment; (2) in *Hall v. State*,[31] the Supreme Court of Indiana upheld the reckless homicide conviction of parents whose son died of pneumonia following treatment by spiritual means; (3) in *Walker v. Superior Court*,[32] California upheld the involuntary manslaughter conviction of a mother whose daughter died from acute meningitis following treatment by prayer alone; and (4) in the unreported case of *Cottam*,[33] recently decided in Wilkes-Barre, Pennsylvania, parents were convicted of third-degree murder in the death of their fourteen-year-old son following a religiously motivated fast.[34] These cases are examined below to highlight statutory and constitutional issues.

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26. 79 Fla. at 655, 84 So. at 679.
27. 220 Md. at 599, 155 A.2d at 690.
28. Comment, *supra* note 21, at 408.
29. Trescher & O'Neill, *supra* note 3, at 217.
30. 345 Pa. Super. at 36, 497 A.2d at 630.
31. 493 N.E.2d at 436.
32. 47 Cal. 3d at 144, 763 P.2d at 873, 253 Cal. Rptr. at 22.
33. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).
34. *Id.*

III. THE STATUTORY ISSUES

A. *The Act or Omission Distinction*

Criminal conduct requires the commission of a voluntary act.[35] Without this stipulation, one could conceivably be found criminally liable for acts committed while unconscious[36] or for thoughts which never materialize into action.[37] When failure to act causes harm, criminal liability may or may not follow; the determinative factor is the existence of a legal duty to act.[38] This duty can arise from a relationship creating the duty, the most obvious being that of parent and child.[39]

1. *Determining "Legal Duty" of Others*

When no legal or statutory relationship exists, courts have struggled with the analysis required to determine culpability for harmful acts of omission. In *Jones v. U.S.*,[40] decided in 1962, the District of Columbia Circuit reversed a manslaughter conviction because the accused had no legal duty to care for the deceased. The defendant had permitted the infant son of a family friend to live in her home. The child died of malnutrition, although the defendant had the means to provide sustenance. The court found that the defendant had no duty to care for the child through statute, contract, or direct relationship.[41]

Fifty-five years earlier, in *People v. Beardsley*,[42] a Michigan court reached the same result using the same reasoning. In *Beardsley*, the accused failed to obtain medical help for a weekend guest in his home whom he knew had swallowed a lethal dose of morphine. Mr. Beardsley's conviction was overturned because he had no legal duty toward his guest.

Compare *Jones* and *Beardsley* to the English court's announcement in 1893 that the moral obligation of a woman who lived in her invalid aunt's home to provide her aunt with food constituted a legal duty.[43] When courts have no statutorily defined duty on which to rely, and define the harmful act as omissive, results are inconsistent and unjust.

2. *Codification of the Parental "Legal Duty to Act"*

In England, the Poor Law Amendment Act[44] and the Prevention of Cruelty to Children Act[45] demonstrated early codification of the parents' legal duties. In

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35. S. KADISH & S. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 188-98 (1989).

36. *See, e.g.*, People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970) (evidence of involuntary unconsciousness is a complete defense to a charge of criminal homicide).

37. S. KADISH & S. SCHULHOFER, *supra* note 35, at 197.

38. Leavens, *Criminal Omissions*, 76 CALIF. L. REV. 547, 552-57 (1988).

39. *Id.* at 557.

40. 308 F.2d 307 (D.C. Cir. 1962).

41. *See* S. KADISH & S. SCHULHOFER, *supra* note 35, at 207-08.

42. 150 Mich. 206, 113 N.W. 1128 (1907).

43. Regina v. Instan, 1 Q.B. 450 (1893).

44. 31 & 32 Vict. ch. 122, § 37 (1868).

45. 57 & 58 Vict. ch. 41 (1894).

this country, child endangerment statutes serve the same purpose: they invariably require provision of food, shelter and medical care, and violation of these statutes can result in the imposition of criminal penalties.[46] The purpose of child endangerment statutes is to prevent the financial dependency of children upon the state. This is why courts consistently examine the parent's financial ability to provide for his child's needs in determining willfulness of neglect.[47]

Child endangerment statutes defining legal duty play an important role when parents are prosecuted for manslaughter or murder following the death of a child due to lack of food or medical care. Because the parent's conduct has been omissive, criminal liability depends upon the existence of a legal duty. The child endangerment statutes provide the basis for this legal duty. The violation of the endangerment statute provides the unlawful act required in the homicide statute.

The four cases mentioned earlier, *Barnhart*,[48] *Hall*,[49] *Walker*[50] and *Cottam*,[51] took place in Pennsylvania, Indiana and California. The child endangerment statutes of these states are typical of most child endangerment statutes in that they exempt from the provision of medical care those whose religious beliefs call for treatment by prayer.[52] Each of the accused in *Barnhart*, *Hall*, *Walker*, and *Cottam* were charged with manslaughter or murder under the homicide statutes, and with neglect under the endangerment statutes of their respective states. Consequently, each parent argued that he was exempt from prosecution under both the homicide and endangerment statutes because his conduct was not proscribed due to the exemption in the endangerment statutes.[53] All three courts rejected this argument on the basis that the exemption appeared only in the endangerment statutes and not in the homicide statutes under which each of the defendants was separately charged.[54]

3. *Results of the Omission Analysis*

The omission analysis, which relies upon the legal duty to act, evolved from the distinction made between the harmful act and the harmful omission. One commentator suggested that courts should abandon this traditional approach and should examine instead the causal connection between the actor's conduct, be it act or omission, and the harm proscribed.[55] This approach would remove the focus upon legal duty and relationships. The application of child endanger-

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46. *See* Note, *supra* note 3, at 398.

47. Annotation, *Homicide by Withholding Food, Clothing, or Shelter*, 61 A.L.R.3d 1207 § 2(a) (1975).

48. 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).

49. 493 N.E.2d 433 (Ind. 1986).

50. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989).

51. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).

52. Note, *supra* note 3, at 398 & n.32.

53. *Barnhart*, 345 Pa. Super. at 17-19, 497 A.2d at 620-21 (18 PA. CONS. STAT. § 4304 challenged as vague; "duty of care" not defined); *Hall*, 493 N.E.2d at 435; *Walker*, 47 Cal. 3d at 120-38, 763 P.2d at 856-69, 253 Cal. Rptr. at 5-18.

54. 345 Pa. Super. at 35-36, 497 A.2d at 630; 493 N.E.2d at 436; 47 Cal. 3d at 143-44, 763 P.2d at 873, 253 Cal. Rptr. at 22.

55. Leavens, *supra* note 38, at 590-91. The omission analysis has proven to be particularly troublesome in cases of withdrawal of medical treatment from comatose patients. *Id.* at 584-87.

ment statutes in cases involving deaths of children would be unnecessary to show legal duty or unlawful act. Because the exemptions for those who believe in faith healing appear only in the endangerment statutes, there would be no question of exemptions. There would simply be a question as to whether or not the child's death resulted from lack of food or lack of customary medical care. The parents would be charged under the homicide statutes alone.

Examination of the policies underlying the child neglect and homicide statutes highlights the merits of this suggested approach. Child neglect statutes were designed to prevent dependency of children upon the state. Homicide statutes were designed to deter, or seek retribution for, unacceptable conduct which society has deemed deserving of criminal sanction. When a parent causes his child to die, the latter policy is clearly relevant.

B. *Level of Culpability*

1. *Application of Level of Culpability Standards*

In the four recent cases being examined, *Barnhart*,[56] *Hall*,[57] *Walker*[58] and *Cottam*,[59] the requisite *mens rea*[60] for each conviction was recklessness, or gross negligence. To sustain a conviction with a *mens rea* of recklessness, the state must prove that the accused was aware of the risk of harm and consciously disregarded the risk of harm. The defendants in *Barnhart*,[61] *Hall*[62] and *Walker*[63] all argued that the requisite level of culpability could not be proven. Each of their arguments was grounded upon the faith healing exemption in the applicable child endangerment statute.

a. Barnhart

The Barnharts were convicted of involuntary manslaughter, defined as "the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner (where the actor) causes the death of another person."[64] The unlawful act committed was child endangering which, under Pennsylvania law, requires that the welfare of the child be "knowingly" endangered:[65] a "person acts knowingly . . . when [with respect to his conduct] he is aware that his conduct is of that nature . . . and [with respect to the result of his conduct] he is aware that it is practically certain that his conduct will cause such a result."[66] On appeal the Barnharts claimed that the jury should have been instructed that, if the defendants were

56. 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).
57. 493 N.E.2d 433 (Ind. 1986).
58. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989).
59. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).
60. *Mens rea* means criminal intent. BLACK'S LAW DICTIONARY (5th ed. 1979).
61. 345 Pa. Super. at 31-32, 497 A.2d at 627.
62. 493 N.E.2d at 435.
63. 47 Cal. 3d at 134-35, 763 P.2d at 866, 253 Cal. Rptr. at 15.
64. 345 Pa. Super. at 35, 497 A.2d at 629-30 (quoting from 18 PA. CONS. STAT. § 2504).
65. *Id.* at 36 n.13, 497 A.2d at 630 n.13.
66. *Id.* at 31 & n.11, 497 A.2d at 627 & n.11.

acting under the mistaken belief that their prayers would heal their son, this belief would negate the mental element of awareness because the defendants would not have been aware of the risk of their conduct.[67] The appellate court rejected this argument because the defendants had not claimed at trial that they relied on prayer out of mistake or ignorance.[68]

Some authority does exist for the proposition that one who believes in the power of his faith might not, in fact, be aware of the risk inherent in his conduct and, therefore, the defense of lack of requisite intent could succeed.[69] However, in this age of advanced medical technology, it is difficult to argue after a child has died that the risk of not seeking medical care, or of not eating for extended periods, is either a justifiable or an insubstantial risk. A child's death obviates the argument. Nevertheless, the defendants in *Barnhart* assumed the position that their choice to follow their religious teachings left them no choice of treatment. In his charge to the jury, the trial judge in *Barnhart* answered the parents' claim that they followed a religious law: "to permit any man to set up an alleged religious or conscientious belief to override the laws of the land would be to create an ecclesiastical authority which human experience has demonstrated to be the most oppressive tyranny under which mankind has ever groaned."[70] Why, then, allow parents to fail to provide medical care for a sick child under any circumstances?

b. Hall

In *Hall v. State*, the Halls were convicted under Indiana's reckless homicide[71] and child neglect[72] statutes. Indiana defines reckless conduct as that which occurs in "plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct."[73] Indiana's child neglect statute exempts from criminal liability a caretaker who "in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent."[74] The Halls argued that the exemption in the child neglect statute for those choosing prayer in lieu of medical care brought their "reckless" conduct within the realm of acceptable standards.[75]

The court, in a remarkably unsatisfactory resolution, found that the Indiana legislature had distinguished bodily injury neglect from fatal neglect. Neglect resulting in serious bodily injury to a child is governed by the neglect stat-

67. *Id.* at 31-32, 497 A.2d at 628.

68. *Id.*

69. People v. Strong, 37 N.Y.2d 568, 338 N.E.2d 602, 376 N.Y.S.2d 87 (1975) (manslaughter conviction reversed because jury could have found defendant did not perceive risk involved when he stabbed victim repeatedly during ritualistic ceremony).

70. 345 Pa. Super. at 29-30 n.10, 497 A.2d at 626-27 n.10.

71. IND. CODE § 35-42-1-5 (1985).

72. IND. CODE § 35-46-1-4 (1985).

73. 493 N.E.2d at 435 (quoting IND. CODE § 35-41-2-2 (1985)).

74. *Id.* at 435 (quoting IND. CODE § 35-46-1-4 (1985)).

75. *Id.* at 435.

ute; neglect resulting in a child's death is governed by the homicide statute.[76] Under the homicide statute, which has no prayer exemption, the Halls' argument failed. The Supreme Court of Indiana thus upheld the reckless homicide conviction but not the child neglect conviction because of the doctrine of double jeopardy. The pattern of child neglect formed the basis of the reckless homicide; the Halls could not be convicted of both the offense and the instrumentality of the offense.[77]

c. Walker

In *Walker v. Superior Court*,[78] Ms. Walker also argued that she did not possess the degree of culpability necessary to be convicted for involuntary manslaughter and felony child endangerment.[79] In California, criminal negligence is the degree of culpability which must be proven under either statute. Criminal negligence means "aggravated, culpable, gross, or reckless [conduct that] . . . must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life . . . ."[80] Ms. Walker cited the old English cases described above in support of her argument that she believed in prayer and so was unaware of the risk to her daughter. She argued further that since California's misdemeanor child neglect statute allows prayer in lieu of medical care, her conduct did not constitute a deviation from acceptable behavior. A finding of gross negligence, the defendant argued, would be incompatible with the legislative intent behind the exemption for faith healers.[81]

The Supreme Court of California rejected Ms. Walker's claims that her defense was established by English common law and her sincerity and good faith in treating her daughter with prayer.[82] California employs an objective test of reasonableness, and the fact finder determined that a reasonable person would have been aware of the risk and would have sought medical care for someone in her daughter's condition. Thus, the court presumed that Ms. Walker had that awareness. The court noted, however, that Ms. Walker's sincerity argument could succeed in a jurisdiction using a subjective test of criminal negligence where the question of awareness would turn on what was in her own mind. As to legislative intent, the court found that California merely accommodates religious practices when children are threatened with no serious harm.[83]

d. Cottam

In a Pennsylvania trial court, Mr. and Ms. Cottam were convicted of third degree murder in the death of their fourteen-year-old son following an extended

76. *Id.*
77. *Id.* at 436.
78. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989).
79. *Id.* at 134-39, 763 P.2d at 866-69, 253 Cal. Rptr. at 15-18.
80. *Id.* at 136, 763 P.2d at 866, 253 Cal. Rptr. at 15-16.
81. *Id.* at 136, 763 P.2d at 868, 253 Cal. Rptr. at 17.
82. *Id.* at 135-36, 763 P.2d at 867-68, 253 Cal. Rptr. at 17.
83. *Id.* at 137 n.17, 763 P.2d at 868 n.17, 253 Cal. Rptr. at 17 n.17.

family fast.[84] In Pennsylvania, a third degree murder charge lacks specific intent to kill but requires malice. "Malice in context of third-degree murder may be found if defendant consciously disregards an unjustified and extremely high risk that his actions might cause death or serious bodily harm."[85] When Eric Cottam died, he had not eaten for six weeks. The family's savings of $3,775.00 were set aside for their church, and they believed that God would rescue them.[86] This is the first starvation case in Pennsylvania to "rise[] above involuntary manslaughter."[87] The Cottams are expected to appeal their convictions.[88] Perhaps *Cottam* signals the reversal of the trend toward societal and judicial acceptance of harmful religious practices noted by Trescher and O'Neill thirty years ago.

2. *Results of Judicial Application of Culpability*

In both *Barnhart*[89] and *Hall*,[90] the courts based the manslaughter convictions on "unlawful" acts as defined in the child endangerment statutes. This interdependence of statutes is quite common. A substantial number of jurisdictions have statutory schemes which include the misdemeanor-manslaughter rule.[91] Simply put, the manslaughter charge is contingent upon the commission of an unlawful act, usually a misdemeanor offense. Like the felony-murder rule, it "dispenses with proof of culpability and imposes liability for a serious crime without reference to the actor's state of mind."[92]

Aside from this general criticism that the misdemeanor-manslaughter rule ignores the *mens rea* with respect to death, in prayer healing cases the use of child endangerment statutes as a basis for the manslaughter charge is problematic because of the exemptions for prayer healers. The Model Penal Code classification of offenses requires, for manslaughter, a finding of recklessness, and for murder, a finding of recklessness with an extreme disregard for the value of human life.[93] This scheme would operate without reference to the neglect statutes which are liable to include exemptions. Using the murder statute rather than the manslaughter statute, as Pennsylvania did recently in the *Cottam* case, also dispenses with the necessity of filing separate charges under the child endangerment statutes.

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84. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).

85. 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1989).

86. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).

87. *Id.*

88. *Id.*

89. 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).

90. 493 N.E.2d 433 (Ind. 1986).

91. A.L.I. MODEL PENAL CODE AND COMMENTARIES § 210.3, 75-77 & nn.91-94 (1980).

92. *Id.* at 77.

93. *Id.* at § 210.3 & § 210.2.

IV. THE CONSTITUTIONAL ISSUES

A. *Limits on the Free Exercise Clause*

The first amendment of the United States Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[94] The Supreme Court held in *Cantwell v. Connecticut*[95] that this proscription extends to the states through the due process clause of the fourteenth amendment.[96] In this same opinion, the Court reiterated its announcement from *Reynolds v. United States*[97] that whereas the freedom to believe is absolute, the freedom to act is subject to regulation for the protection of society.[98]

This dichotomy of believing and acting with respect to one's religion has been the subject of much scholarly debate.[99] Some twenty years after *Cantwell*, the Court recognized in *Braunfeld v. Brown*[100] that government regulations can place an indirect burden upon religious activity and must do so only when its secular purpose cannot otherwise be achieved. Two years after *Braunfeld*, the Court upheld a free exercise challenge to South Carolina's unemployment law in *Sherbert v. Verner*.[101] The Court reasoned that exempting a Seventh Day Adventist from the Saturday work requirement would not threaten the viability of the state's unemployment program. *Braunfeld* and *Sherbert* ushered in a "rights-protective review standard in free exercise cases."[102]

In another line of cases independent of the free exercise clause, the Supreme Court found that parents have the right to make decisions about their children's education without undue interference by the government. In *Meyer v. Nebraska*,[103] the Court invalidated a state statute prohibiting the study of foreign languages prior to the eighth grade. Two years later, the Court announced in *Pierce v. Society of Sisters*[104] that parents may choose to send their children to schools run by religious organizations rather than to public schools. Both cases were decided on the basis of the fourteenth amendment's due process clause.

Nonetheless, as with most issues of constitutional dimension, competing interests must be weighed in the balance. The safety and well-being of children is

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94. U.S. CONST. amend. I.

95. 310 U.S. 296 (1940).

96. *Id.* at 303.

97. 98 U.S. 145 (1879).

98. 310 U.S. at 303-04.

99. *See, e.g.*, Choper, *The Free Exercise Clause; A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 943-46 (1986). *See generally* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); Ingber, *Religion or Ideology: A Needed Clarification of the Religious Clauses*, 41 STAN. L. REV. 233 (1989); Kamenshine, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606 (1987).

100. 366 U.S. 599 (1961).

101. 374 U.S. 398 (1963).

102. Lupu, *supra* note 99, at 940.

103. 262 U.S. 390 (1923).

104. 268 U.S. 510 (1925).

one of the most compelling interests that a government can assert.[105] *Prince v. Massachusetts*[106] stands for the proposition that the state possesses broad authority over the child while that of the family is not without limits. In *Prince*, a guardian was found to have violated a law prohibiting children from selling materials in public places when she allowed the child to help her distribute publications of her religious denomination on the street. "Parents may be free to become martyrs themselves," the Court stated, "[b]ut it does not follow they are free . . . to make martyrs of their children before they have reached the age . . . when they can make that choice for themselves."[107]

In its role of *parens patriae*, however, the state must be vigilant against interfering with fundamental personal freedoms and rights of the family. One fundamental right is the interest of parents in the religious upbringing of their children. In *Wisconsin v. Yoder*,[108] the Court found that the Amish choice to discontinue formal education following the eighth grade outweighed the state's interest in universal education until age sixteen.[109]

Against this judicial backdrop, parents whose religious practices ultimately harm their children assert a complete defense under the first amendment's free exercise clause. Case law in the state courts shows an overwhelming consensus that the safety, health, and well-being of children outweigh the parents' rights of free exercise when the latter clearly threatens the former.[110] *Barnhart*,[111] *Walker*[112] and *Cottam*[113] are no exception.

The *Barnhart* court recognized that its decision penalized the parents in the practice of their religion and emphasized that the liability stemmed from their having sacrificed their child's life, citing *Prince* as authority.[114] Using the same rationale, the *Walker* court found that parents "have *no* right to free exercise of religion at the price of a child's life, regardless of the prohibitive or compulsive nature of the governmental infringement."[115] The court further concluded that criminal prosecution represented the least restrictive alternative available to the state that was still adequately effective.[116]

In their Pennsylvania trial, the Cottams raised an issue that Justice Douglas discussed in his partial dissent to *Yoder*:[117] children have constitutional rights. Justice Douglas believed that the Amish teenagers involved in the Wisconsin compulsory education dispute had the right to choose for themselves; yet the majority in *Yoder* dismissed the issue because the children were not legally

105. *See* Note, *The Outer Limits of Parental Autonomy: Withholding Medical Treatment from Children*, OHIO ST. L.J. 813, 815-17 (1981).

106. 321 U.S. 158 (1944).

107. *Id.* at 170.

108. 406 U.S. 205 (1972).

109. *Id.* at 236.

110. For an excellent collection of cases, see Comment, *supra* note 21, at 405 n.41 & 407 n.48.

111. 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).

112. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989).

113. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).

114. 345 Pa. Super. at 26, 497 A.2d at 624.

115. 47 Cal. 3d at 140, 763 P.2d at 870, 253 Cal. Rptr. at 19.

116. *Id.* at 141, 763 P.2d at 871, 253 Cal. Rptr. at 20.

117. 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

adults.[118] Similarly, the Pennsylvania court did not permit the Cottams to argue their children's first amendment rights to free exercise because the children were in their parents' care.[119] It is not clear whether the *Cottam* court considered the children unemancipated and therefore subject to parental direction or so strongly influenced by their parents that they were unable to form their own ideas.

The Supreme Court has not availed itself of the opportunity to rule on the right to free exercise in the situation where a child has died because of parental religious practices. Nor does the Court seem so inclined at this point since the Court has denied certiorari in both *Barnhart*[120] and *Walker*.[121] The consistency of the findings in the state courts could explain the Court's disinclination to grant certiorari. Despite the consistent findings among the state courts on this constitutional argument, however, defendants invariably raise constitutional defenses. The related due process argument analyzed below could explain the continued reliance upon the constitutional defenses.

B. *The Due Process Argument*

Constructive notice is an established principle in criminal law. Laws must be readily comprehensible to the ordinary person so that he may know when his conduct constitutes an offense.[122] Ordinary persons do not typically read laws, but the publication of the laws serves as constructive notice to everyone. Thus, the deterrence goal of the criminal law is served.[123]

The notion that fair warning must be given, through either constructive or actual notice, as to what behavior carries criminal sanction is the basis for the vagueness doctrine.[124] Vague laws violate due process rights by chilling the exercise of protected freedoms, permitting arbitrary or discriminatory enforcement of the laws, and impairing the effectiveness of the judicial process.[125] Judicial interpretation can sometimes correct a vague statute, but must not create an unforeseen extension of the law.[126]

When a prosecution occurs without notice, the defendant can argue that he is deprived of property or liberty without due process of law. Parents charged with criminal offenses following the death of a child through the practice of religious beliefs have made such lack of notice claims.[127] The basis for this assertion lies in the fact that child neglect or endangerment statutes include exemptions for faith healing in lieu of medical care. How can the government, so

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118. *Id.* at 230-31.

119. Columbus Dispatch, Sept. 9, 1989, at 2A, col. 3 (Pa. Ct. of Common Pleas, 11th D. Sept. 8, 1989).

120. 345 Pa. Super 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).

121. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989).

122. Winters v. New York, 333 U.S. 507 (1948).

123. *See id.* (Frankfurter, J., dissenting).

124. Todd, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855, 857-60 (1974).

125. *Id.*

126. Bouie v. City of Columbia, 378 U.S. 347, 352-53 (1964).

127. *See, e.g.*, State v. Miskimens, 22 Ohio Misc. 2d 43, 490 N.E.2d 931 (1984).

the argument goes, permit faith healing under one law and criminally prosecute under another law when the faith healing fails?

In *State v. Miskimens*,[128] an Ohio Court of Common Pleas outlined reasons why the religious exemption in the Ohio child endangering statute is unconstitutional. Mr. and Mrs. Miskimens were indicted on child endangering and involuntary manslaughter charges after their infant son died of a bacterial infection following treatment by prayer.[129] Ohio Revised Code § 2919.22(A) reads in part, "[i]t is not violative of a duty of care . . . under this division when the parent . . . of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body."[130] The *Miskimens* court found that this sentence in the statute (1) violates the establishment clause of the first amendment by showing a preference for one religion over another and entangling the state in a determination of what constitutes "spiritual means" and "recognized religious body;" (2) unjustifiably permits parents to endanger the lives of their children in the exercise of religious beliefs; and (3) violates the equal protection clause of the fourteenth amendment by creating a group of parents with special exemptions and, more importantly, a group of children without the same protection as most.[131] The court announced a prospective invalidation of that sentence in Ohio's child endangerment statute.

The *Miskimens* court went on to dismiss the charges of endangering children and involuntary manslaughter against the defendants because the statute as applied was unconstitutionally vague:[132] "[i]t is now apparent that the statute fails to provide fair notice as to what contemplated conduct is forbidden, and fails to set reasonably clear guidelines for those charged with its administration."[133]

As the Miskimens did in Ohio, the defendant in *Walker* attacked the California statutes as unconstitutionally vague. Walker argued that California's child endangerment and felony statutes, when read together, create uncertainty about proscribed conduct; do not articulate a standard of conduct; and fail to provide fair notice that criminal liability can arise from practicing faith healing that does not work.[134] The court responded that uncertainty on the part of law enforcement officials is resolved by prosecutorial discretion and, read separately, the statutes do articulate standards; the court also stated that a law may not be void for vagueness when reasonable construction can be given to its language.[135]

It is interesting to note that, in his concurring opinion in *Walker*, Justice Mosk found, as did the Ohio court in *Miskimens*, that the religious exemption in the child endangerment statute violated the establishment clauses of the

128. *Id.*
129. *Id.* at 49, 490 N.E.2d at 936.
130. OHIO REV. CODE ANN. § 2919.22(A) (Anderson 1988).
131. 22 Ohio Misc. at 44-47, 490 N.E.2d at 935-36.
132. *Id.* at 47-49, 490 N.E.2d at 936-38.
133. *Id.* at 48, 490 N.E.2d at 938.
134. 47 Cal. 3d at 141-43, 763 P.2d at 871-72, 253 Cal. Rptr. at 20-21.
135. *Id.* at 143, 763 P.2d at 873, 253 Cal. Rptr. at 22.

United States and California Constitutions.[136] One commentator examining California's conundrum has suggested that California revise its child endangerment statute to specify that medical care shall be provided whenever permanent harm could otherwise result.[137]

In *Commonwealth v. Barnhart*,[138] the defendants also presented a constitutional due process argument; they claimed lack of notice that faith healing could result in criminal liability. However, their no notice claim was dismissed on the facts of the case. The Superior Court of Pennsylvania reasoned that the Barnharts clearly knew that their son was in grave danger and so were on notice of his imminent death.[139] They were charged with consciously disregarding a substantial and unjustifiable risk that death would result. The court explained that not every behavior tending to bring about a proscribed result need be specified in a statute.[140]

It is clear that courts are not always persuaded by the no notice claim. But *Miskimens* should serve as notice to lawmakers that the anomaly of faith healing exemptions in child endangerment statutes can relieve from criminal sanction parents whose children have died as a result of their parents' religious practices. By the same token, the lives of some children might be saved through the elimination of such exemptions.

V. THE POLICY ISSUES

A. *The State's Objectives*

How does one's view of the criminal law affect the outcome of these cases? The major purposes of the criminal law are deterrence and retribution.[141] Most criminal sanctions are imposed today because the state has an interest in preventing or deterring particular conduct. Certainly the state wants to prevent the death of children whenever possible. The current trend toward prosecution of parents whose children are harmed as a result of religious practices is consistent with this goal if we believe that the threat of prosecution deters parental religious practices which threaten their children's lives.

On the other hand, do most people feel retributive toward a parent whose child died through that parent's actions or failure to act? While people generally feel sympathy toward a bereaved parent, outrage at the futility of the child's death would likely outweigh any sympathy. Since both the deterrent and retributive goals of criminal justice are served by prosecution in these cases, why are exemptions placed in the neglect statutes? At what point does a parent administering prayer to his sick child turn from a (non-negligent) faith healer into a criminal? According to the courts, a parent becomes a criminal when the child dies.

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136. *Id.* at 144-51, 763 P.2d at 873-78, 235 Cal. Rptr. at 22-27 (Mosk, J., concurring).
137. Note, *supra* note 3, at 417.
138. 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 488 U.S. 817 (1988).
139. *Id.* at 19, 497 A.2d at 621.
140. *Id.* at 19 n.4, 497 A.2d at 621 n.4.
141. *See generally* S. KADISH & S. SCHULHOFER, *supra* note 35, at 113-65.

B. *The Parents' Interests*

Parents share their interest in personal freedoms with the rest of the population. In addition, parents have an interest in being allowed to use their discretion to guide their children and in being allowed the freedom to pass on their values and beliefs to their children. This holds true regardless of the nature of those values and beliefs.

States have historically given wide berth to the parent-child relationship in recognition of the parents' superior understanding of their children's needs.[142] Modern child abuse and neglect statutes reflect the values of parental autonomy and family independence, but, at the same time, purport to protect the child. If placing children at risk constitutes neglect, how can legislatures sanction exemptions for parents who refuse medical care for their sick children?

When laws codify religious exemptions and courts interpret and apply these exemptions, the opportunity for bias emerges. Discrimination can be detected in our laws among those whose faith is shared by many and those whose beliefs are new or whose numbers are few.[143] Parents want their children protected by the same freedoms they enjoy. Religious freedom is jeopardized when some groups are extended privileges by the state in what may well be a direct contravention of the establishment clause of the first amendment.

C. *The Community's Interest*

Because most people live in urban or semi-urban areas in the United States, families are not typically isolated. Children are exposed to a myriad of ideas and cultural influences outside their families. Parents must engage themselves with their children in the community in order to protect their interests. Community includes all of the places where people spend time working, learning, worshipping, exercising, shopping, relaxing, and talking. It is in many of these places that children who are at risk can be found long before the state would know or have reason to act. Recognition of child abuse and neglect has long been a concern in schools and day care centers. Awareness efforts must be expanded so that all segments of the community can assist with recognition and action.

VI. CONCLUSION

Despite the uneven but certain movement toward the prosecution of parents whose children die as a result of religious practices, parents consistently raise the first amendment defense of free exercise of religion. Although the United States Constitution guarantees the free exercise of religion and our socio-legal system values parental autonomy, the state's interest in the safety of its children outweighs the parents' personal rights when children's lives are threatened. This argument makes sense.

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142. *See* Note, *supra* note 105, at 814-15; *see also* Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989).

143. *See, e.g.*, Africa v. Commonwealth, 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982).

The inclusion of religious exemptions in child endangerment statutes, however, makes no sense. These exemptions conceivably serve two purposes: (1) to further ensure the free exercise of religion and (2) to guard against arbitrary intrusion upon the family by agents of the state. The United States Constitution already guarantees both of these purposes, and the state itself controls the conduct of its child protection agencies. But the exemptions are not simply harmless surplusage in the law. They have created either expectations of immunity or due process arguments for the defense or both. Moreover, courts have noted that the exemptions cause unconstitutional entanglement of church and state. The religious exemptions in child endangerment statutes should be abolished.

In addition to the proposal that our child endangerment statutes be rid of exemptions for faith healers, this Note has suggested two alternative approaches to the prosecution of parents whose children die as a result of religious practices: (1) prosecute for murder rather than for manslaughter, thus avoiding use of the endangerment statutes to establish the unlawful act or legal duty; and (2) reject the omission analysis, which requires that a legal duty be established, in favor of a direct analysis of the causal connection between conduct and the proscribed harm.

No form of prosecution, however effective, can prevent these tragedies. Affirmative action beyond abolishing religious exemptions or varying prosecution strategies must be taken. Those who choose to place their children at risk, through practices which are religiously motivated or otherwise, need to be identified so that their children can be protected from harm. Public awareness and empowering communities to respond quickly must be priorities in the prevention effort.

Judith Inglis Scheiderer